

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 6, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1708-CR

Cir. Ct. No. 2010CF699

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTOINE O. HENRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Antoine O. Henry appeals a judgment convicting him of two counts of strangulation, two counts of battery, and one count of disorderly conduct after a trial to the court. He also appeals an order denying his

postconviction motion. He argues that he did not knowingly, intelligently and voluntarily waive his right to a jury trial. We affirm.

¶2 “A criminal defendant’s right to a trial by jury is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution.” *State v. Grant*, 230 Wis. 2d 90, 95, 601 N.W.2d 8 (Ct. App. 1999). A defendant may waive the right to a jury trial in favor of a trial to the court. *See* WIS. STAT. § 972.02(1) (2011-12).¹ The circuit court must conduct a personal colloquy with the defendant on the record to ensure that a defendant’s decision to waive the right to jury trial is knowing and voluntary. *See State v. Anderson*, 2002 WI 7, ¶23, 249 Wis. 2d 586, 638 N.W.2d 301. The colloquy must show that the defendant “was aware of the nature of the jury trial, such that it consists of a panel of 12 people [who] must agree on all elements of the crime charged.” *Id.*, ¶24 If a defendant does not understand this unanimity requirement, the jury waiver is invalid. *Id.*

¶3 A defendant who contends that he or she did not knowingly and voluntarily waive the right to a jury trial has the initial burden of showing that the colloquy was defective and that he or she did not understand the information that should have been provided. *Grant*, 230 Wis. 2d at 98-99. The burden then shifts to the State to show by clear and convincing evidence that the defendant’s jury waiver was knowing and voluntary. *Id.* “We will uphold the circuit court’s findings of fact unless they are clearly erroneous.” *See State v. Miller*, 2012 WI 61, ¶26, 341 Wis. 2d 307, 815 N.W.2d 349. Whether the jury waiver was valid

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

based on the facts found by the circuit court is a question of law that we review *de novo*. **Anderson**, 249 Wis. 2d 586, ¶12.

¶4 Henry contends that his plea was not knowingly and voluntarily entered because he did not know that all of the jurors would have to agree unanimously about each element of the offense to convict him. The circuit court did not inform Henry during the jury waiver colloquy that the jury would have to be unanimous in finding guilt or innocence, so Henry has met his burden of showing that the plea colloquy was defective. The question before us, then, is whether the State met its burden of showing that Henry understood the unanimity requirement.

¶5 At the postconviction motion hearing, Henry's trial lawyer, Daniel Muza, testified that he explained the unanimity requirement to Henry; Muza told Henry that a jury of twelve people would have to listen to the testimony and decide unanimously whether he was guilty or innocent. Muza also testified that it was his standard practice to inform his clients that a jury would have to find them guilty as to each element of the offense, although he did not specifically recall whether he had done that here. In contrast, Henry testified that he knew that a jury consisting of twelve people would have to agree on the verdict, but he did not understand that the jurors would have to agree on each element of the offense. The State introduced the jury waiver form signed by Henry, which provided that twelve jury members would have to agree unanimously on the verdict to find Henry guilty, although the form did not explicitly provide that all twelve jurors would have to agree regarding each element of the offenses. The State also introduced plea questionnaire forms from two prior cases where Muza represented Henry. The forms, which Henry reviewed and signed, informed Henry that he had a right to a jury trial where the State would have to prove the elements of the

crimes beyond a reasonable doubt and all twelve jurors would have to agree unanimously.

¶6 The State met its burden of showing that Henry understood the unanimity requirement. The circuit court found Muza's testimony to be more credible than Henry's testimony. Muza testified that he informed Henry that the jury had to reach the verdict unanimously both in person and through the written jury waiver form. He also testified that it was his standard practice to explicitly inform his clients that the jury had to be unanimous as to each element. In addition to Muza's interactions with Henry in this case, Henry had experience with the concept of jury waiver and had been informed at least twice in prior cases the State had to prove the elements of a charged crime to convict and all of the jurors had to agree. Based on Muza's testimony and Henry's prior court experience as documented in the plea waiver forms he completed in other cases, the State met its burden of showing that Henry knew that the jurors would have to unanimously agree on the verdict to convict him, including agreeing on all elements of the crimes. We reject the argument that Henry did not knowingly and voluntarily waive the right to a jury trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

